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IN THE

SUPREME COURT OF THE UNITED STATES

No. 242

ROBERT L. MILLER and MILDRED M. MILLER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

ROBERT L. MILLER and MILDRED M. MILLER,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

To: THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

For convenience, the Plaintiffs will be referred to herein as Petitioners, and the Defendant will be referred to as the Government.

Reference to Printed Transcript of the Record in the Petition will be T.R. Page ____, and reference to the Original Record will be O.R. Page ____.

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C., Section 1254.

DECISION TO BE REVIEWED

Petitioners respectfully petition this Court to grant a Writ of Certiorari to the United States Court of Appeals, Tenth Circuit, to review the Decision of that Court, Appendix A, to petition, entered against Petitioners on March 1, 1963, in Case No. 7100, *United States of America* v. *Robert L. Miller and Mildred M. Miller, Petitioners*, reversing the judgment entered for Petitioners in the United States District Court for the District of Wyoming, on March 16, 1962, T.R. Page 26, reported with Memorandum Opinion, Findings of Fact and Conclusions of Law, T.R. Pages 23-26, Volume 202 F. Supp. Page 650. Petition for Re-Hearing by Circuit Court denied by Order entered April 1, 1960, Page 6 of Transcript of Record of Proceeding in Circuit Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

Circuit Court of Appeals, Tenth Circuit, in its Decision, committed errors prejudicially affecting the substantial rights of Petitioners.

1. In holding that an assessment of a Federal income tax was not required as the basis of determining the liability of Petitioners for payment of an income tax for the tax years of 1952 and 1953.

2. In holding that Petitioners' claims for refunds are barred by Section 322 (b) (2) (A) of Internal Revenue

Code 1939, 1952 Ed., see Decision of Circuit Court, Appendix A, Page A10.

3. In holding that the remittances made by Petitioners on January 15, 1953, and January 14, 1954, were payments of existing, defined, and determined tax obligations and not estimated income tax payments (see Stipulation T.R. Page 22, Par. 13) held by the Government to the credit of Petitioners and applied by the Government to discharge any income tax obligation of Petitioners, if and when it be determined that Petitioners owed an income tax for the years 1952 and 1953.

4. In holding that Section 322 (b), Subsection (2) (A) of Federal Internal Revenue Code 1939, barred Petitioners' right to refunds of the money deposited with the Government after the Government admitted that Petitioners did not owe the Government an income tax for either of the tax years in question.

5. In refusing Petitioners' claims for refunds after it was determined that Petitioners did not owe any Federal income tax for either 1952 or 1953 tax years, Circuit Court Decision, Appendix A, Page A2, Findings of Fact No. 7 of Trial Judge's Memorandum Opinion, T.R. Page 27 and Stipulation of parties, T.R. Page 21, Par. 7, and Page 22, Par. 7.

6. The refusal to return Petitioners' money violated the Fifth Amendment to the Constitution of the United States by:

> "depriving Petitioners of their property without due process of law",

it having been admitted by the Government that Petitioners did not owe any Federal income tax and no income tax having been assessed against Petitioners for the tax years 1952 or 1953.

7. The Decision of the Circuit Court, Tenth Circuit, is in conflict with the Decision of the Circuit Court of Appeals, Ninth Circuit, *Schmidt* v. *Commissioners of Internal Revenue*, 272 F.2d 423, decided November 19, 1959, which holds that a remittance made as an estimated tax did not constitute payment of a tax for the purpose of starting the running of time within which a claim for refund would not be barred by Statute of Limitations (Section 322 (b) (2) (A) 1939 Internal Revenue Code).

8. The Decision of the Circuit Court of Appeals of the Tenth Circuit is in conflict with the Decision of the Circuit Court of Appeals of the Seventh Circuit in *Plankinton* v. *United States*, 267 F.2d Page 278, in which the Court held that estimated tax payments did not constitute tax payments that start the time running within which a claim for refund can be filed.

9. In holding that the Decision in *Roseman et al.* v. *United States*, 323 U.S. 658, 89 L. Ed. 535, is not applicable as authority determining any questions involved in the case at bar and in disregarding the law pronounced in the Roseman case, holding that advances of estimated taxes as tax payments do not start the running of the time within which a claim for refunds could be filed.

I. Internal Revenue Code of 1939, Section 322 (26 U.S.C.), 1952 Edition, Section 322.

The issue for review is whether Petitioners' claims for refunds of $64,000.00, remitted to the District Director of Internal Revenue for the tax years 1952 and 1953, T.R. Page 22, Stipulation Par. 13, is barred by Section 322 (b) (2) (A) of the Internal Revenue Code 1939, 1952 Ed. The Circuit Court Decision ruled the Petitioners' claims were barred, see Appendix A, Page A10.

The Federal District Court gave judgment for Petitioners, that they recover from the Government $64,000.00, holding that Petitioners' right to a refund was not so barred. Upon appeal from this judgment, the United States Court of Appeals, Tenth Circuit, reversed the judgment of the District Court, holding that Petitioners' right to refunds was barred by Section 322 (b) (2) (A) of the Internal Revenue Code 1939.

H. Concise Statement of Undisputed Facts upon Which Petitioners Rely to Obtain a Writ of Certiorari.

Jurisdiction of Federal District Court invoked under Title 28, U.S.C., Sections 1340, 1346(a) and 1402(a).

The Petitioners were not at any time indebted to the Government for an income tax payment for either 1952 or 1953.

The Director of Internal Revenue never assessed an income tax liability against Petitioners for either 1952 or 1953 or otherwise asserted a liability against Petitioners for either 1952 or 1953.

The judgment of the District Court upon the trial of this case found Petitioners were not indebted to the Government for an income tax for either 1952 or 1953. T.R. Page 24, Finding of Fact by Trial Court, Par. 7.

The Circuit Court of Appeals, Tenth Circuit, in its Decision stated Petitioners did not owe any income tax for either 1952 or 1953; Appendix A, Page A2.

The Petitioners and the Government stipulated that as of September 27, 1961, the Government had not determined that Petitioners owed any income tax for the years 1952 or 1953; T.R. Page 21, Par. 7 and Page 22, Par. 7.

Petitioners, on January 15, 1953, remitted a check in the amount of $32,000.00, dated January 15, 1952, payable to the District Director of Internal Revenue for the District of Wyoming, upon which was written "for income tax" as an estimated tax payment for the tax year 1952, Stipulation T.R. Page 22, Par. 13.

On January 14, 1954, Petitioners remitted a check in the amount of $32,000.00, dated January 14, 1954, payable to the District Director of Internal Revenue for the District of Wyoming, upon which was written "income tax estimate" for the year 1953, Stipulation T.R. Page 22, Par. 13, see Decision of Circuit Court, Appendix A, Page A3.

There was no tax return, tax document, or any information accompanying either of these remittances, Circuit Court Decision, Appendix A, Page A3 Findings of Fact No. 30, Memorandum Opinion of Trial Court, T.R. Page 24.

Prior to the delivery of each of these checks, no assessment of an income tax had been made against the Petitioners for either of the tax years in question, and there was no record of any kind in the office of the District Director of Internal Revenue for the District of Wyoming, showing an assessment had been made against Petitioners of a Federal income tax or showing that there was then outstanding against the Petitioners an obligation to pay an existing income tax for 1952 or 1953, see testimony of witness Wayne R. Ross, T.R. Pages 39, 40, and 73, Circuit Court Decision, Appendix A, Page A3.

The $64,000.00 has been retained in the possession of the Government since the two remittances were made, Stipulation T.R. Page 2, Par. 12, and Page 22, Par. 12.

On February 15, 1960, the Petitioners filed their income tax returns for the years 1952 and 1953, which were received by the District Director of Internal Revenue for

the District of Wyoming, no exception was ever taken thereto, and they were not disapproved or rejected by the Director, see Stipulation T.R. Page 21, Par. 6, Page 22, Par. 6, Circuit Court Decision, Appendix A, Page A4. Each of these income tax returns declared no income tax due for the years in question, see Stipulation T.R. Page 20, Par. 5, and T.R. Page 22, Par. 5.

The failure of Petitioners to file their income tax returns within the period fixed by Statute for these years as well as other tax years is explained in Petitioners' verified statement, T.R. Pages 7-9, and that statement was accepted by the Trial Court which determined as a question of fact that Petitioners had shown a justifiable excuse for such failure.

The Government had not, as of September 27, 1961, determined that Petitioners owed any income tax for either of these years 1952 or 1953, see Stipulation T.R. Page 21, Par. 7, and Page 22, Par. 7, Circuit Court Decision, Appendix A, Page A4.

III. The Manner in Which the Two Checks Were Handled in the Director's Office.

When the estimated tax payment made by Petitioners on January 15, 1953, was received by the Director of Internal Revenue, the payment was credited directly to the tax-payers' 1952 estimated tax account and when the estimated tax payment made on January 14, 1954 was received, it was credited directly to the tax-payers' 1953 estimated income tax account, see Petitioners' Exhibit E, O.R. Page 20, Appendix B received in record T.R. Page 35, and the testimony of Internal Revenue officer D. J. Cole, T.R. Pages 30-33.

Petitioners' estimated tax remittances for the years 1952 and 1953 were listed by the Collection Division of

the Director of Internal Revenue for the District of Wyoming on August 30, 1960, see Petitioners' Exhibit D, O.R. 11 Page 28, received in the record T.R. Page 30, Appendix C, and Internal Revenue officer D. J. Cole's testimony, T.R. Pages 28-33.

IV. The Circuit Court Decision Holds the Government's Right to Deny Petitioners' Claims for Refunds Is Not Dependent upon Whether or Not Petitioners Owed an Income Tax for 1952 or 1953.

The validity or propriety of the manner in which the Petitioners' two checks were handled in the Director's office, is not approved by the Circuit Court Opinion, Appendix A, Page A4; where the Decision states:

> "We express no opinions as to the validity or propriety of the procedure followed."

The Circuit Court Decision, Appendix A, Page A3, says "an assessment was in fact made." The basis of this assertion is that Petitioners were assessed by tape, see the testimony of Wayne R. Ross, an officer of the Government, and certain exhibits which he identified. Ross testified that the $32,000.00 received from the Petitioners, evidenced by a check dated January 15, 1953, was accepted as payment in full of the Petitioners' tax liability for the year 1952, and that it was placed on the assessment list on the 6th day of February, 1953, and that the check dated January 14, 1954, was accepted as payment in full of the Petitioners' income tax liability for the year 1953, and was placed on the assessment list on the 5th day of February, 1954, and that said amounts were entered upon the Government's Exhibit 23E, identified as the tax list for the month of January, 1953. That such entry in the Government's Exhibit 23E was a step toward the assessment of the ac-

counts transmitted by the District Director of Internal Revenue to the Commissioner of Internal Revenue, T.R. Page 49, that from Exhibit 23E, an entry was made in the Daily Journal, another official record of the Government, and thereafter the remittance of $32,000.00, received from Petitioners, was then listed in an assessment certificate, identified as the Government's Exhibit 23C, that the same procedure was followed with the 1954 remittance; testimony of witness Wayne R. Ross, T.R. Pages 73-75 and Pages 81-82.

The above testimony states the manner in which the Petitioners' remittances were handled by the Director of Internal Revenue and relied upon by the Government as the basis for determining the liability of the Petitioners for the payment of income taxes for each of the years in question. Witness Wayne R. Ross says Petitioners were assessed by tape for the years 1952 and 1953, T.R. Page 82.

Petitioners were never notified that they had been assessed by tape, or at all, they were never informed that their 1952 and 1953 estimated income tax remittances had been accepted as payments in discharge of their tax liability, when there never was a defined and determined income tax obligation against Petitioners for the years in question, or how their payments had been defined and determined as an obligation requiring payment by Petitioners, see Appendix A, Pages A4-A5. The Circuit Court Decision calls the actions of the Internal Revenue officials, as related by witness Wayne R. Ross, unilateral actions of the Director made without the knowledge or acquiescence of the tax-payers.

V. The District Court Says the Government Held Petitioners' $64,000.00 Illegally Because No Income Tax Was Ever Assessed Against Petitioners for the Years 1952-1953.

The judgment entered by the Trial Court was based upon his Findings of Fact that no assessment had ever been made by the Government against the Petitioners for the years in question and that at the time Petitioners' remittances were made for the respective years, there was no existing tax liability based on an income tax assessment showing that the Petitioners were then indebted to the Government for an income tax for either of said years, District Court Findings of Fact, Numbers 3 to 8, T.R. Pages 23-24.

VI. Petitioners' Mistake.

The Circuit Court states that Petitioners "made a mistake as to their tax liability", Appendix A, Pages A7 and A9, and mistakenly paid the $64,000.00 as estimated federal income taxes when they did not owe any income tax. That the two checks constituted over-payments made by way of mistake, prior to an income tax assessment being made against Petitioners, and that refunds of such estimated tax remittances made more than three years prior to the dates the claims for refunds were filed, are barred by Section 322 (b) (2) (A) Internal Revenue Code 1939. The purpose of Petitioners' remittances is very clear and was understood by the Government when it stipulated, T.R. Page 22, Par. 13, that the $64,000.00 was paid as estimated tax for the years 1952 and 1953.

Petitioners' estimated income tax payments were made when there was no assessment for income taxes outstanding against Petitioners, as distinguished from a payment

to discharge a tax obligation that had been defined and definitely determined as a debt due to be discharged by payment thereof.

WHEREFORE Petitioners respectfully request their Petition for Writ of Certiorari be granted, submitting that the matter involved is substantial and in the interest of obtaining a just determination thereof, a review by this Court is merited.

Respectfully submitted,

JAMES A. GREENWOOD,
Council of Record for Petitioners.

527 Hynds Building
Cheyenne, Wyoming.

CERTIFICATE OF SERVICE

I, James A. Greenwood, certify that service of a copy of Petitioners' Petition for Writ of Certiorari in the above case was made by United States mail, by depositing a true copy of such Petition in the United States Post Office at Cheyenne, Wyoming with first-class air mail, postage prepaid, addressed to:

The Solicitor General
Department of Justice
Washington 25, D. C.;

Louis F. Oberdorfer
Assistant Attorney General
Department of Justice
Washington 25, D. C.;

Michael A. Mulroney
c/o Clerk of the United States
Circuit Court of Appeals
Denver, Colorado;

Robert N. Chaffin
United States District Attorney for
the District of Wyoming
Post Office Building
Cheyenne, Wyoming.

Dated this 24th day of June, A. D. 1963.

JAMES A. GREENWOOD,
Counsel of Record for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7100—February Term, 1963

UNITED STATES OF AMERICA,
Appellant,
v.
ROBERT L. MILLER and
MILDRED M. MILLER,
Appellees.

Appeal from the United States District Court for the District of Wyoming.

(Filed United States Court of Appeals, Tenth Circuit. March 1, 1963. Robert B. Cartwright, Clerk.)

Michael A. Mulroney, Attorney, Department of Justice (Louis F. Oberdorfer, Assistant Attorney General, Lee A. Jackson, David O. Walter, and Arthur I. Gould, Attorneys, Department of Justice, Robert N. Chaffin, United States Attorney, and Leroy V. Amen, Assistant United States Attorney, were on the brief) for Appellant.

James A. Greenwood for Appellees.

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The issue is whether the appellee taxpayers can recover a total of $64,000 mistakenly paid by them as esti-

mated federal income tax for years when they owed no tax. The trial court overruled the defense of the statute of limitations asserted by the government and gave the taxpayers the judgment which they sought.[1]

The applicable statute of limitations, § 322 (b) of the Internal Revenue Code of 1939, provides in its subsection (1) that a claim for refund must be presented within three years from the time of the filing of a return and in its subsection (2)(A) that a refund shall not exceed the tax paid during the three years immediately preceding the filing of the claim.[2] The government concedes that the claims were filed within three years of the returns and relies solely on subsection (2)(A) which limits the refund to the tax paid in the three years immediately preceding the filing of the claim. Application of §322(b)(2)(A) prevents recovery as the payments were made more than three years before the filing of the claims.

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1. The opinion of the trial court is reported at 202 F. Supp. 650.

2. Section 322(b), as amended, appears at 26 U.S.C., § 322(b), 1952 ed., and so far as material reads:

"(b) Limitation on allowance—(1) Period of Limitation.

Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) Limit on amount of credit or refund.

The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim."

The issue is the applicability of the statutory limitation asserted by the government to the facts of this case. Relying on Rosenman et al., Executors, v. United States, 323 U.S. 658, the taxpayers contend that the two $32,000 checks were voluntary remittances and not tax payments because no tax obligation arose upon which an assessment could be made, or a tax paid, until the returns for the two years in question were filed. The government denies the applicability of the Rosenman decision and says that the checks were sent to discharge the obligation of the taxpayers under the Current Tax Payment Act of 1943,[3] to which reference will be made later, and that an assessment was in fact made.

The pertinent facts are not disputed. The taxpayers, husband and wife, are in the ranching and livestock business in Wyoming. On January 15, 1953, they sent a check for $32,000 to the Director of Internal Revenue. The check bore the notation "For income tax." On January 14, 1954, they sent another check which was for $32,000, was payable to the Director, and bore the notation "Income tax estimate." Neither check was accompanied by a federal income tax return or any other tax document. Each check was deposited to the account of the Treasurer of the United States and duly paid by the bank upon which drawn. The Director credited each check to the taxpayers' account as representing their full payment of estimated tax for the taxable years 1952 and 1953, respectively.

When each check was received by the Director, nothing in his office revealed that the taxpayers owed any tax for the respective tax years. No declarations of tax and no returns had been filed, although the taxpayers believed that their attorney had filed such returns.

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3. C. 210, 57 Stat. 126 (1943), as amended.

After the receipt of the taxpayers' checks and in accordance with routine procedures, the Director's office prepared index cards bearing identifying numbers. From these cards the amount of each check was posted on the assessment list (Treasury Form 23E). The daily information shown on all assessment lists was summarized and recorded in the daily journal. The monthly totals of the daily journal were summarized and posted to the assessment certificate (Treasury Form 23C) which, an officer of the Internal Revenue Service testified, "records the official action of the assessment officer who makes the assessment against the taxpayers." The assessment certificates were dated, respectively, February 6, 1953, and February 5, 1954.

On February 15, 1960, the taxpayers filed returns for 1952 and 1953 showing no income tax due in either year. Neither of these returns has been disapproved or rejected. The tax authorities have not determined that the taxpayers owed any federal income tax for the years 1952 and 1953.

At the same time they filed their returns for 1952 and 1953, the taxpayers filed claims for refunds in the amount of $32,000 for each year. The refund claim for 1952 says that the $32,000 remittance to the Director was "paid on January 15, 1953, for Declaration of Estimated Tax for year 1952." Except for difference in dates a similar statement was on the refund claim for the year 1953. The refunds were disallowed on the ground that the amounts claimed were barred from refund by the statutory period of limitations. Taxpayers then brought this suit to recover.

The manner in which the two checks were handled in the Director's office is not dispositive of the case. We express no opinion as to the validity or propriety of the procedures followed. As we appraise the situation, the

unilateral actions of the Director made without the knowledge or acquiescence of the taxpayers do not determine whether the checks were voluntary remittances or were in discharge of an obligation imposed by the federal income tax statutes.

The Current Tax Payment Act of 1943 requires a declaration of estimated income tax[4] and the payment of that estimated tax.[5] When the declaration is permitted to be filed after September 15 of the taxable year and is so filed, the estimated tax must be paid in full at the time of the filing of the declaration.[6] An individual deriving at least two-thirds of his gross income from farming, may file the declaration at any time on or before January 15 of the succeeding taxable year.[7] The taxpayers in the instant suit were within the classification of farmers, had until January 15 of the succeeding taxable year to file their declaration, and were required to pay the amount in full at the time of the filing of the declaration.

Section 322(e) of the 1939 Internal Revenue Code, as amended by the Current Tax Payment Act of 1943 and the Individual Income Tax Act of 1944, provides in part:[8]

> "* * * For the purposes of this Section, any amount paid as estimated tax for any taxable year shall be deemed to have been paid not earlier than the fifteenth day of the third month following the close of such taxable year."

In its consideration of the Current Tax Payment Act of 1943, Congress recognized the desirability of fixing a

4. 26 U.S.C., § 58(a), 1952 ed.
5. 26 U.S.C., § 59, 1952 ed.
6. 26 U.S.C., § 59(a)(4), 1952 ed.
7. 26 U.S.C., § 60(a), 1952 ed.
8. 26 U.S.C., § 322(e), 1952 ed.

definite date on which estimated tax payments would be deemed paid for purposes of the refund limitations of § 322.[9] Congress considered that the establishment of such a date was "in the interest of certainty and administrative feasibility."[10]

The parties stipulated that the amount for which recovery is sought was "paid as estimated tax for the years 1952 and 1953." The Current Tax Payment Act of 1943 imposed a duty on the taxpayers to declare their estimated tax and to pay the amount thereof. Section 322(e) fixes the presumptive date of payment for the purpose of the application of the provisions of § 322(b) relating to the limitations on refunds and credits. In the case at bar the presumptive dates are more than three years prior to the filing of the claims for refunds.

Argument that § 322(b)(2)(A) does not apply when no tax is in fact due is foreclosed by a provision of the Current Tax Payment Act of 1943 which, as amended, appears at 26 U.S.C. § 3770(c), 1952 ed., and reads:

> "An amount paid as tax shall not be considered not to constitute an overpayment solely by reason

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9. See S. Rep. No. 1631, 77th Cong., 2d Sess., 1942-2 Int. Rev. Cum. Bull., 504, 632; S. Rep. No. 221, 78th Cong., 1st Sess., 1943 Int. Rev. Cum. Bull., 1314, 1339, 1343; H. Conf. Rep. No. 510, 78th Cong., 1st Sess., 1943 Int. Rev. Cum. Bull., 1351, 1367, 1371.

10. 1942-2 Int. Rev. Cum. Bull., 504, 632. The House Conference Report No. 510, supra, 1943, Int. Rev. Cum. Bull., 1351, 1371, says: "All such payments of estimated tax are for the purpose of the provisions of law relating to refund or credit of the tax imposed by Chapter 1, including the provisions relating to interest on overpayments of such tax, deemed to have been paid on the 15th day of the third month following the close of the taxable year."

of the fact that there was no tax liability in respect of which such amount was paid."

The purpose of this section was to assure that "mistakes both as to the amount of the tax and as to the existence of any tax liability * * * are to be corrected under the provisions of law governing overpayments."[11] In the case at bar the taxpayers made a mistake as to their tax liability. Congress has said that the amount so paid shall be treated as an overpayment. The refund and credit of overpayments are governed by § 322 and are subject to the limitations found in § 322(b)(2)(A).

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11. S. Rep. No. 221, 78th Cong., 1st Sess., 1943 Int. Rev. Cum. Bull., 1314, 1339-1340, says:

> "The income tax law requires the taxpayer to make a return of his tax and to pay the tax so returned. These requirements contemplate that in the discharge of these duties at the time, place, and manner prescribed honest mistakes will occur—mistakes both as to the amount of the tax and as to the existence of any tax liability; and that such honest mistakes made incident to the bona fide orderly compliance with the actual or reasonably apparent duties of the taxpayer are to be corrected under the provisions of law governing overpayments. In the opinion of your committee, existing law so provides. The language of certain court decisions (holding that certain payments, not made incident to a bona fide and orderly discharge of actual or reasonably apparent duties imposed by law, are not overpayments and accordingly that interest is not payable) has been read by some as meaning that no payment can result in an overpayment if no tax liability actually existed. Your committee does not believe that such reading is in any way a statement of existing law. The provisions of the bill, however, emphasize the need for clarity in this regard.
>
> "Under the bill as reported by your committee, two requirements become basic features of the income tax: (1) the declaration and payment of the estimated tax; and (2) the withholding and collection by the employer of tax from the wages of employees, and the return and payment as such of the amount by the employer to the Government. Honest mistakes incident to faithful and orderly compliance will, of course, occur, just as they have in the older procedures of the tax. The doubts expressed as to the existence of an overpayment in case it ultimately turns out that there is no tax, your committee believes, should be put to rest, and to this end submits the amendment to section 3770 of the Code."

The taxpayers' claim that the statute of limitations is inapplicable is grounded on the theory that the checks were voluntary remittances and hence, under the Rosenman decision, were not within the purview of the statute. Rosenman was concerned with an estate tax. The executors paid $120,000 "under protest and duress, and solely for the purpose of avoiding penalties and interest." The Commissioner denied a claim for refund made more than three years later and the Court of Claims upheld his denial. The Supreme Court reversed[12] holding that the $120,000 remittance was a payment "in escrow" and a "deposit arrangement" and not a payment in discharge of what the taxpayer deemed to be a liability or of a liability that was asserted. The Court observed that the transaction was not one which would give rise to a claim against the government for interest and could not be a payment to bar suit by the taxpayer for its illegal retention because "it will not do to treat the same transaction as payment and not as payment, whichever favors the Government." Significantly the Court said that it did not need to consider the effect of the Current Tax Payment Act of 1943.

Turning to decisions of other federal appellate courts since Rosenman, Thomas v. Mercantile Nat. Bank at Dallas, 5 Cir., 204 F.2d 943, and United States v. Dubuque Packing Company, 8 Cir., 233 F.2d 453, were cases in which the taxpayers voluntarily made deposits to prevent the accrual of interest on possible deficiencies. Moskowitz v. United States, Ct. Cl., 285 F.2d 451, was an action to recover an amount paid as an offer in compromise. Roles v. Earle, 9 Cir., 195 F.2d 346, certiorari denied 344 U.S. 819, was a suit against a collector to recover "a voluntary payment by the taxpayer made purely for his own convenience." In Lawyt Corp. v. Commissioner of Internal

12. 323 U.S. 658, 662-663.

Revenue, 2 Cir., 215 F.2d 518, modified on other grounds, 349 U.S. 237, the court held that a taxpayer was not entitled to have remittances treated as satisfaction of tax liabilities and at the same time contest its liability therefor and said that the remittances were no more than deposits.

Plankinton v. United States, 7 Cir., 267 F.2d 278, was an action for refund of tax overpayments. The court recognized the applicability of the refund limitation imposed by § 322(b)(2)(A) and the presumed date of payment fixed by § 322(e) but held that the presumed date of payment was extended when the time for the filing of the return had been extended and the return subsequently filed within the extended time. In Schmidt v. Commissioner of Internal Revenue, 9 Cir., 272 F.2d 423, the court assumed, we believe erroneously, that estimated income tax payments were not subject to the refund limitation provisions. Hill v. United States, 3 Cir., 263 F.2d 885, was a suit to recover an overpayment of estate taxes resulting from the omission from the return of certain deductions to which the estate was entitled. Recovery was held barred by the statute of limitations.

We have a case of mistake. The taxpayers believed that they had an obligation to pay estimated income taxes. The notations on the checks show this. The returns, subsequently filed and not now questioned by the government, revealed the mistake. The issue is narrowed to whether the limitation on refunds imposed by § 322(b)(2)(A) applies to overpayments made by way of mistake. We think that it does.[13]

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13. In Jones, Collector of Internal Revenue, v. Liberty Glass Co., 332 U.S. 524, 531, the Supreme Court in referring to § 281 of the 1924 Act, which was carried through to § 322 of the 1939 Code, said: "* * * we read the word 'overpayment' in its

To summarize, under the applicable provisions of the Current Tax Payment Act of 1943, the taxpayers had an obligation to make a declaration of estimated income tax. In their situation the payment was due when the estimate was filed. Section 322(e) fixes the presumptive date of payment of estimated income tax and nothing is shown to rebut that presumption. Section 3770 was enacted to assure that mistakes as to the amount and existence of tax liability are controlled by the provisions governing overpayments.[14] That section says that non-liability for tax does not remove the amount paid from the category of an overpayment. Congress intended to assure that overpayments because of mistake would draw interest. At the same time it placed a limit on the recovery.

We hold that recovery is barred by § 322(b)(2)(A). The alieviation of hardship resulting from the application of a statute of limitations is a matter of policy for Congress—not for the courts.[15]

Reversed.

---

usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment."

14. Note 11, supra.

15. The Supreme Court, in upholding the bar of § 322(b)(1) to the recovery of an overpayment, said in Kavanagh, Collector of Internal Revenue, v. Noble, 332 U.S. 535, 539: "* * * the loss which he [the taxpayer] now suffers from an application of § 322(b)(1) is a loss which is inherent in the application of any period of limitations. Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. Rosenman v. United States, 323 U.S. 658, 661. Remedies for resulting inequities are to be provided by Congress, not the courts."

APPENDIX B

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
CHEYENNE, WYOMING

November 8,

In Reply Refer to
C
Miss Keller

C. W. Gaymon
c/o Raab, Roush and Gaymon
Hynds Building
Cheyenne, Wyoming

Dear Mr. Gaymon:

This is in response to your request for information concerning the list date by our Collection Division of several returns. They were listed as follows:

Robert L. & Mildred Miller	1952	August 30, 1960
Robert L. & Mildred Miller	1953	August 30, 1960
Robert M. Miller	1952	October 12, 1960
James M. Miller	1952	February 9, 1960

We hope this information will be of help to you.

Very truly yours,

/s D. J. Cole
D. J. Cole
Chief, Taxpayer Service Section

United States of America
District of Wyoming } *ss:*

I, Harry W. McMillen, Clerk of the United States District Court for the ---------- District of Wyoming, do hereby certify that the annexed and foregoing is a true and full copy of the original PLAINTIFFS' EXHIBIT "D" offered and received into evidence at the trial on October 17, 1961, in Case No. 4487 Civil, ROBERT L. MILLER and MILDRED M. MILLER, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant. now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Cheyenne, Wyoming this 5th day of June, A. D. 1963.

/s/ Harry W. McMillen
Clerk.

(Seal)

By .....
Deputy Clerk.

APPENDIX C

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
CHEYENNE, WYOMING

September 12, 1961

In Reply Refer to
C
Miss Keller

C. W. Gaymon, C.P.A.
American National Bank Building
Cheyenne, Wyoming

RE: Robert L. & Mildred Miller

Dear Mr. Gaymon:

This is in response to your letter about payments made by these taxpayers.

The payment of $32,000.00 made in January, 1953, was credited directly to the taxpayers' 1952 estimated tax account. The $32,000.00 payment made in January, 1954, was credited directly to their 1953 estimated tax account.

Very truly yours,

/s/ D. J. Cole
D. J. Cole
Chief, Taxpayer Service and Accounts Section

United States of America
District of Wyoming } ss:

I, Harry W. McMillen, Clerk of the United States District Court for the ---------- District of Wyoming, do hereby certify that the annexed and foregoing is a true and full copy of the original PLAINTIFFS' EXHIBIT "E" offered and received into evidence at the trial on October 17, 1961, in Case No. 4487 Civil, ROBERT L. MILLER and MILDRED M. MILLER, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Cheyenne, Wyoming this 5th day of June, A. D. 1963.

/s/ Harry W. McMillen
Clerk.

(Seal)

By .....
Deputy Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 242

ROBERT L. MILLER AND MILDRED M. MILLER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 202 F. Supp. 650. The opinion of the court of appeals (Pet. A1–A10) is reported at 315 F. 2d 354.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1963. (Pet. A1.) A petition for rehearing was denied on April 1, 1963. The petition for a writ of certiorari was filed on June 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the taxpayers' claim for refund of amounts paid by them as estimated federal income tax was barred by the statute of limitations.

STATUTES INVOLVED

The pertinent provisions of §§ 58, 59, 60, 322, and 3770 of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 13–15.

STATEMENT

Robert L. Miller and his wife are Wyoming ranchers. On January 15, 1953, they sent a check for $32,000 to the District Director of Internal Revenue. The check bore the notation, "For income tax." On January 14, 1954, they sent a second check, also for $32,000, payable to the District Director. The second check bore the notation "Income tax estimate." Neither check was accompanied by a declaration of estimated income tax or any other document. The District Director credited each check to the taxpayers' account as representing a payment in full of estimated tax for the taxable years 1952 and 1953, and assessments in like amounts were made against the taxpayers in the normal course of office procedure. The assessment certificates were dated February 6, 1953, and February 5, 1954, respectively. (Pet. A3–A4.)

The taxpayers filed tax returns for the years 1952 and 1953 on February 15, 1960. The returns showed no tax due for either year. The Commissioner has not determined that the taxpayers owed any tax for either year. (Pet. A4.)

The taxpayers filed claims for refund of the two $32,000 payments at the same time that they filed their returns. Each refund claim stated that the amounts were "paid * * * for Declaration of Esti-

mated Tax." The refunds were disallowed by the Commissioner on the ground that the amounts claimed were barred by the statute of limitations. (Pet. A4.) The district court held the claims not barred, but the court of appeals reversed, holding that the refund claims were out of time under § 322(b)(2)(A) of the Internal Revenue Code of 1939.

ARGUMENT

The decision below is correct and the contrary decision of the Ninth Circuit in *Schmidt* v. *Commissioner*, 272 F. 2d 423, was not only reached without consideration of the relevant statutory provisions but is in any event now precluded by the changed wording of the 1954 Code. Certiorari should therefore be denied notwithstanding the conflict of decisions.

1. Although the checks were not accompanied by the required declarations of estimated tax, it was stipulated by the parties that the $64,000 was "paid as estimated tax for the years 1952 and 1953" and petitioners do not claim that anything turns upon the absence of the declarations (R. 22, ¶13; see Pet. 7, A6).[1] Nor did petitioners impose any special restrictions upon the application of the payments. We may accordingly deal with the case as one involving the declaration and payment in the ordinary course of estimated income taxes under §§ 58–60 of the Internal Revenue Code of 1939. The application to such payments of the provisions governing the allow-

[1] Were anything to turn upon the lack of a declaration, moreover, the case would be limited in importance to that fortuitous and unusual circumstance and would for that reason not warrant review here.

ance of refunds (§ 322), in turn, leaves no doubt that the recovery of the payments made here was barred by the time the claims for refund were filed. The analogy petitioners seek to draw between estimated income tax payments and the "deposit" on account of estate taxes which was held not to start the statute of limitations running in *Rosenman* v. *United States*, 323 U.S. 658, simply overlooks the express statutory provisions defining the nature of the estimated tax.

a. Section 58 of the Code[2] imposes upon each individual with income in excess of stated amounts the duty to "make a declaration of his estimated tax for the taxable year" (§ 58(a)). The declaration must state the amount which the taxpayer "estimates as the amount of tax under this chapter for the taxable year," and the excess of that amount over his estimated credits for withholdings "shall be considered the estimated tax for the taxable year" (§ 58(b)). Section 59 prescribes the times at which the "estimated tax shall be paid." Normally, the declaration is required to be filed on March 15 of the taxable year (§ 58(d)(1)), and in that event the estimated tax is required to be paid in quarterly installments the last of which is due on January 15 of the following year (§ 59(a)(1)). In the case of persons, such as petitioners, who derive more than two-thirds of their income from farming, however, the declaration need not be filed until January 15 of the following year (§ 60(a)), in which event "the estimated tax shall

[2] The provisions relating to the declaration and payment of estimated taxes were added to the 1939 Code by the Current Tax Payment Act of 1943, 57 Stat. 126.

be paid in full at the time of the filing of the declaration" (§ 59(a)(4)). The application of estimated tax payments is governed by § 59(d):

> (d) *Payment as part of tax for taxable year.*—Payment of the estimated tax, or any installment thereof, shall be considered payment on account of the tax for the taxable year. Assessment in respect of the estimated tax shall be limited to the amount paid.

In short, taxpayers have an independent duty to pay "the estimated tax" as such on the dates prescribed; its payment is considered "payment on account of the tax for the taxable year"; and an immediate assessment, in the amount of the payment, is contemplated. In no sense is the required payment of the estimated tax merely a "deposit" to be held in suspense for future application as a tax payment only if and when the final return for the year is filed. It is a completed payment of tax, and the fact that it exceeds the taxpayer's true tax liability for the year as finally reported or determined establishes only that there has been an "overpayment" of tax subject to the refund procedures of the Code.

b. In their application to estimated tax payments, the refund provisions are explicit. Section 322(a) authorizes a refund whenever there has been "an overpayment of any tax imposed by this chapter."[3]

[3] An "amount paid as tax" may be an "overpayment" for that purpose even though, as is claimed here, "there was no tax liability in respect of which such amount was paid" (§ 3770(c)). That provision confirms that the refund procedure is the proper remedy for mistakes as to the existence of a tax liability as well as for mistakes as to the amount of liability. For its history, see Pet. A7, n. 11.

Section 322(b)(2)(A), however, limits the allowable refund (when, as here, the claim for refund is filed within three years after the return is filed) to "the portion of the tax paid * * * during the three years immediately preceding the filing of the claim" Section 322(e) then provides:

> * * * For the purposes of this section, any amount paid as estimated tax for any taxable year shall be deemed to have been paid not earlier than the fifteenth day of the third month following the close of such taxable year [*i.e.*, the day on which the annual return is due, § 53(a)].

That provision also governs the "date of the overpayment" from which interest on the refund is payable (§ 3771(b)(2) and (f)).

That amounts paid "as estimated tax" in excess of the taxpayer's true tax liability for the year are "overpayments" the recovery of which is governed by the refund procedures (and their limitations) is confirmed by the inclusion in § 322(e) of a special rule fixing a constructive date of payment of estimated taxes for that purpose. The only possible room for doubt in applying those provisions derives from the fixing of the constructive date as "not earlier than" (rather than "on") March 15 of the following year. Since, however, there is no other provision under which payments of the estimated tax could be "deemed" to have been made later than they actually were, the necessary effect is to fix March 15 as the constructive date of payment for any estimated tax payments made before that date.

That that was in fact the purpose of § 322(e) is confirmed by the legislative history, and the words "not earlier than" were apparently used instead of "on" only out of an excess of caution to forestall any claim that payments actually made *after* that date should be back-dated. The versions of the bill initially reported by the committees in fact used the word "on,"[4] and the change to "not earlier than" was simply one of a number of technical changes offered on the floor of the Senate by Senator George of the Finance Committee "with the approval of the Treasury." 89 Cong. Rec. 4285–4286. The conference committee accepted the change, but the statement of the House managers made clear that the provision was still intended to fix March 15 as the date "on" which estimated taxes paid prior to that date were to be deemed to have been paid. In terms dispositive of this case, the conference report stated (H. Rep. No. 510, 78th Cong., 1st Sess., p. 54):

> All such payments of estimated tax are for the purpose of the provisions of law relating to refund or credit of the tax imposed by chapter 1, including the provisions relating to interest on overpayments of such tax, deemed to have been paid on the fifteenth day of the third month following the close of the taxable year.

It follows from the foregoing that the refund petitioners sought was barred by the statute of limita-

[4] See H. Rep. No. 401, 78th Cong., 1st Sess., p. 36; S. Rep. No. 221, 78th Cong., 1st Sess., p. 40. The wording was drawn from an earlier provision applicable to the victory tax. See Revenue Act of 1942, § 172(e), 56 Stat. 798.

tions. The claim for refund was not filed until February 15, 1960, and under § 322(b)(2)(A) any refund was thus limited to amounts paid after February 15, 1957 (*i.e.*, during the three preceding years). The last payment involved here was made in fact on January 15, 1954, and in legal contemplation (under § 322(e)) on March 15, 1954. Both of those dates were long prior to February 15, 1957, and refund of the payments was accordingly barred.

c. What has been said about the statutory provisions governing the payment and application of estimated taxes fully differentiates the payment of such taxes from the "deposit" made in *Rosenman* v. *United States*, 323 U.S. 658.

In the *Rosenman* case, the executors of an estate obtained a two-month extension for filing the estate tax return but not for payment of the tax. On the original due date, they delivered a check for $120,000 to the Collector with a letter stating that it was being paid "under protest and duress, and solely for the purpose of avoiding penalties and interest" and that the executors contended that not all of that amount was legally due. The payment, in accordance with established practice, was credited to a "suspense" account and no assessment was entered. Two months later, the executors filed a return showing a tax due of some $80,000, upon receipt of which an assessment in that amount was entered and $80,000 of the credit applied against it. After auditing the return, the Commissioner assessed a deficiency and applied the remaining $40,000 credit in partial satisfaction of it. A claim for refund for part of the $40,000 was filed

within three years of the assessment of the deficiency but more than three years after the initial delivery of the check. The Court held that, for purposes of a three-year statute of limitations on the refund of estate taxes "alleged to have been erroneously or illegally assessed or collected," the $40,000 was not a payment of tax until the assessment of the deficiency. Not until then, the Court said, could there be a claim for taxes "erroneously * * assessed"; the prior remittance "did not discharge what [the taxpayer] deemed a liability nor pay one that was asserted," was not treated as a payment of tax by the government (for purposes either of assessment or of allowing interest on overpayments), and was merely a "deposit" or a "payment in escrow" made to stop the running of interest (323 U.S. at 661–662).

Among the many fundamental differences between the "deposit" made in the *Rosenman* case and a payment of estimated tax under § 59 are these: there is an independent statutory duty to pay the estimated tax and a remittance made, without express reservation, as payment of the estimated tax does "discharge" what the taxpayer "deems" a liability; as contemplated by § 59(d), amounts paid as estimated tax are immediately assessed and applied as "payment on account of the tax for the taxable year"; and the statute specifically prescribes the date on which estimated taxes are to be deemed to have been paid, both for purposes of the statute of limitations and for purposes of the allowance of interest on overpayments. In short, payments of "the estimated tax" imposed by § 59 are governed by a specific statutory

scheme wholly unlike anything at issue in the *Roseman* case, and that decision has no bearing here.

2. Although for the reasons given above the decision below is clearly right, petitioners are correct in asserting that the result is in conflict with that reached by the Ninth Circuit in *Schmidt* v. *Commissioner*, 272 F. 2d 423. In that case the court, relying on the *Roseman* case, held that estimated tax payments made in 1944 "did not constitute payment of the tax at that time for the purpose of starting the running of the statute of limitations" and that limitations did not begin to run on the recovery of those payments until the filing of a delinquent return in 1952 (272 F. 2d at 428). In so holding, however, the Ninth Circuit did not cite or discuss any of the provisions creating and defining the duty to pay the estimated tax (§§ 58 and 59), treating its payment as a "payment on account of the tax for the taxable year" (§ 59(d)), or prescribing the time when the estimated tax shall be deemed to have been paid specifically for limitations purposes (§ 322(c)). In view of the court's omission even to consider the relevant statutory provisions, that decision can hardly be taken as an authoritative ruling on the question by the Ninth Circuit. For that reason, although the decisions are inconsistent in result, there is not, we submit, a viable conflict of the kind requiring resolution by this Court. The Ninth Circuit should be allowed to reconsider its prior decision in the light of the relevant statutory provisions and the clarification of the issue by the court below. Only if it should then ad-

here to its prior decision in the *Schmidt* case would the issue be ripe for resolution by this Court.[5]

The question, moreover, is limited to cases governed by the 1939 Code and is thus of no continuing importance. If § 322(e) is not an absolute barrier to the result reached in the *Schmidt* case, it is only because the "not earlier than" language of § 322(e) at least literally leaves open the possibility that the date of "payment" could be later than the prescribed date. The 1954 Code, however, removes the possibility by substituting "on" in the place of "not earlier than." See S. Rep. No. 1622, 83d Cong., 2d Sess., p. 587. Section 6513(b) of the 1954 Code provides:

> * * * For purposes of section 6511 or 6512 [the limitations provisions replacing § 322 of the 1939 Code], any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

Whatever room there may have been for doubt under the 1939 Code has thus been eliminated under the 1954 Code, and we are unaware of any other cases still pending under the 1939 Code which raise the issue. The question accordingly appears to be a dead issue for all practical purposes, and certiorari would

[5] We acknowledge that, for the reason next stated, the question is not likely again to come before the Ninth Circuit, but that surely provides no *more* reason for immediate review by this Court.

not be warranted even if the conflict were more firmly set than it seems to us to be.[6]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
I. HENRY KUTZ,
MICHAEL MULRONEY,
Attorneys.

JULY 1963.

---

[6] Petitioner also alleges a conflict with *Plankinton v. United States*, 267 F. 2d 278 (C.A. 7). In that case, however, the taxpayer had obtained an extension of time for filing his return for the year involved and in fact filed his return within the time as extended. Although there is language in the opinion inconsistent with the rationale of the decision below, all the court actually held was that § 322(e) does not "have the effect of establishing [March 15] as the date of payment for commencing the limitation period for refund purposes *where, as in the instant case*, the time at which the taxpayer's liability is to be defined and determined has been extended in conformity with other provisions of the law" (267 F. 2d at 280 (emphasis added)). In any event, that case was also governed by the 1939 Code and the opinion specifically relied upon the "not earlier than" wording of § 322(e) that was replaced by "on" in § 6513(b) of the 1954 Code. Section 6513(b) also expressly provides that the estimated taxes shall be deemed paid on the due date of the return "determined without regard to any extension of time for filing such return," which even more explicitly precludes the result of the *Plankinton* case.

APPENDIX

INTERNAL REVENUE CODE OF 1939 (AS AMENDED, 26 U.S.C., 1952 ED.)

SEC. 58. DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) *Requirement of Declaration.*—Every individual * * * shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of $4,500 plus $600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed $100 for the taxable year and his gross income to be $600 or more.

* * * * *

SEC. 59. PAYMENT OF ESTIMATED TAX.

(a) *In General.*—The estimated tax shall be paid as follows:

* * * * *

(4) If the declaration is filed after September 15 of the taxable year, and is not required by section 58(d) to be filed on or before September 15 of the taxable year, the estimated tax shall be paid in full at the time of the filing of the declaration.

* * * * *

(d) *Payment as part of tax for taxable year.*—Payment of the estimated tax, or any installment

thereof, shall be considered payment on account of the tax for the taxable year. Assessment in respect of the estimated tax shall be limited to the amount paid.

SEC. 60. SPECIAL RULES FOR APPLICATION OF SECTIONS 58 AND 59.

(a) *Farmers.*—In the case of an individual whose estimated gross income from farming for the taxable year is at least two-thirds of the total estimated gross income from all sources for the taxable year, in lieu of the time prescribed in section 58(d), the declaration for the taxable year may be made at any time on or before January 15 of the succeeding taxable year; * * *.

* * * * * *

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * * *

(b) *Limitation on Allowance.*—

* * * * * *

(2) *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three

years immediately preceding the filing of the claim.

* * * * *

(e) *Presumption as to Date of Payment.*—For the purposes of this section, any tax actually deducted and withheld at the source during any calendar year under Subchapter D of Chapter 9 shall, in respect of the recipient of the income, be deemed to have been paid by him not earlier than the fifteenth day of the third month following the close of his taxable year with respect to which such tax is allowable as a credit under section 35. For the purposes of this section, any amount paid as estimated tax for any taxable year shall be deemed to have been paid not earlier than the fifteenth day of the third month following the close of such taxable year.

* * * * *

SEC. 3770. AUTHORITY TO MAKE ABATEMENTS, CREDITS, AND REFUNDS.

* * * * *

(c) *Rule Where No Tax Liability.*—An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.

U.S. GOVERNMENT PRINTING OFFICE: 1958

IN THE

SUPREME COURT OF THE UNITED STATES

No. 242.

ROBERT L. MILLER and MILDRED M. MILLER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

JAMES A. GREENWOOD,
527 Hynds Building,
Cheyenne, Wyoming,
Counsel of Record for Petitioners.

R. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo. HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 242.

ROBERT L. MILLER and MILDRED M. MILLER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

Petitioners' Claims for Refund Are Not Barred by Any Statute of Limitations.

Petitioners contend there is no Statute of Limitations that can operate to limit the time within which a claim for refund of money belonging to Petitioners, but in possession of the Government, may be filed when the money so held was not paid to the Government at a time when there was outstanding against Petitioners, an assessed tax debt payable by them and when Petitioners were not indebted to the Government for any income tax in any sum for either of the years in question, and not indebted to the Government for any tax of any kind when their money was deposited with the Government nor when their claims for refund were filed.

Defendant contends Sections 322 (b) (2) (a) of the Internal Revenue Code of 1939, bars Petitioners' claims for refund.

Limitations on time within which claims for refund can be filed is stated in Section (b) (1) of Section 322 of the Internal Revenue Code of 1939, as follows:

> (b) Limitation on allowance.
>
> (1) Period of limitation. Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

Section (b) (2) (a) of Section 322, 1939 Internal Revenue Code, fixes the limit of amount of credit or refund. The amount of the credit or refund shall not exceed the portion of the tax paid.

Section (b) (1) fixes the limit of time only for filing the claims for refunds and has nothing whatsoever to do with fixing the amount of a claim that can be recovered.

Section (b) (2) (a) limits the amount of any refund and has nothing whatsoever to do with determining the time within which claims may be filed.

The record shows by Stipulation, pages 20, 21, and 22, of T.R. paragraphs 5, 6, and 7, that Petitioners owed no income tax at the time their payments were made, and their claims for refunds were filed. The returns declared no Federal income tax due or owing by Petitioners to the

Government, and these declarations the Government accepted. Therefore, the provisions of Section (b) (2) (a) are not applicable for the reason no tax was then due to be paid by Petitioners. In the Opinion of the Circuit Court, Appendix A, to Petitioners' Petition, it is stated "the issue is whether the Appellee taxpayers can recover a total of $64,000.00, mistakenly paid by them as estimated Federal income tax for years when they owed no tax."

Under Section 322 (b) (1), Internal Revenue Code of 1939, Petitioners had three years from the date their income tax returns for each year in question were filed, within which to file claims for refunds of the money held by the Government, and it was therefore, wholly immaterial whether the payments made on January 15th, 1953 and January 14th, 1954, were treated as estimated tax payments or payments of tax obligations in resolving the issue before the Court, because Section (b) (1) states the time limit for filing claims for refund in the alternative,

(a) the claim may be filed either within two years after the income tax is paid

(b) or within three years of the time the income tax return is filed, whichever of such periods expires the later.

Section 6511 of the Internal Revenue Code of 1954, Section A, which amended Section (b) (1) of the Internal Code of 1939, fixing the period of limitations for filing claims within which a taxpayer is required to file a claim for refund as three years from the time the return was required to be filed, this limitation replaced the language found in Section 322 (b) (1) of the 1939 Statute by inserting the period of three years from the time the return was required to be filed instead of within three years from the time the return was filed by the taxpayer. The Government states at page 3 of its Brief, notwithstanding the

Decision in *Schmidt* v. *Commissioner*, 272 F.2d 423, is correct, Certiorari should be denied in the Miller case because it will never happen again now that the 1954 Code has changed the wording of the 1939 Code.

It is conceded by Petitioners that under the Limitations Statute, Section 6511, of the Internal Revenue Code, their claims for refund would be filed out of time, but Section 322 (b) (1) of the 1939 Internal Revenue Code is the Statute of Limitation, controlling the Petitioners' right to claim a refund. Conceding that the Petitioners' right in the case at bar, is limited by any Statute.

Petitioners' Payments Made on January 15th, 1953 and January 14th, 1954.

The Government contends these payments were made to discharge existing tax obligations due the Government in fixed, defined amounts, at the times Petitioners' checks were received by the Government.

That these payments were estimated tax payments as distinguished from payment of a tax, is established by the Stipulation of the parties, filed in the Trial Court, T.R. 20-23.

Petitioners submit that the law, as pronounced in the case of *Roseman* v. *United States*, 323 United States Reports, page 685, settles this question, that the Petitioners did not make tax payments, but did deposit money with the Government at a time when there was no outstanding income tax obligation against Petitioners, and when no income tax had been assessed or levied against Petitioners for either of the years when these payments were made. That the remittances were made to the Government in advance of any assessment of tax being made against Petitioners.

What the Government's internal record keeping processes may disclose as to how these payments were entered is not important, it does not enlarge or reduce Petitioners' statutory right to relief, provided for them under the provisions of the Statutes.

The Opinion in the Roseman Case states:

> "That money received by the Director when no assessment is then outstanding against the taxpayer, it is not to be considered as tax payments which will affect the period of time so as to start the running of the Statute of Limitations within which the taxpayer may present a claim for refunds."

The Government has asserted that the moneys retained by it constitute payments of taxes, based on an assessment that was in fact made, see Opinion of the Circuit Court, Appendix A3 to Petition for Writ. There is no proof in the record that the Government in fact made any assessment of income tax against Petitioners for the years in question.

Petitioners' Declarations Made in Their Income Tax Returns.

Petitioners' income tax returns having been filed and neither disapproved nor rejected, the Government now ignores the declarations contained in these returns, which were filed in time, and asserts Petitioners made tax payments with their January remittances. The administrative processes, provided by law, as the authority for the Collector's Office of the Internal Revenue Service to determine whether or not a taxpayer owes a tax commences with the declaration made in the income tax return. The Government now claims that the January payments were tax payments, and without Petitioners being notified by the

Government, or having any knowledge of what disposition the Government had made of the money remitted to it, claimed to have applied said money to tax payments due from Petitioners, and at the same time admitting that Petitioners owed no tax.

The Government, not until 1961, made any claim that Petitioners' remittances had been taken by it in February, 1953 and February, 1954, as payment of taxes assessed against Petitioners. That the money was applied as a payment of income tax obligations of the Petitioners for the years 1952 and 1953, when Petitioners owed no income tax obligations.

The Government Did Not Make an Income Tax Assessment Against Petitioners for 1952 or 1953.

The Government contends that its action in refusing to return Petitioners' money is based upon an assessment of income taxes against Petitioners for 1952 and 1953, and the money was used to satisfy these debts. The Petitioners claim no assessment of an income tax was ever made against them for either of the years in question.

These conflicting contentions cannot be clarified by opposing arguments, the answer is to be found in the Record, see the testimony of witnesses Ross and Cole, and Petitioners' Appendixes B and C, pages A11 and A13, of their Petition for Writ.

The Circuit Court Opinion, Appendix A4 and A5, calls the actions of the Internal Revenue Officials, as related by these witnesses, unilateral actions of the Director, made without the knowledge or acquiescence of the taxpayers.

An Appellate Court is not expected to review a finding of fact made by a Trial Court when there is conflicting

evidence on the fact question to be resolved, there being no substantial evidence in the record to sustain the contention of the Respondent Government, the only way the question can be answered is by examining evidence which will disclose that the Government has not introduced one iota of testimony to support a conclusion of law that a tax assessment was in fact made against Petitioners.

The Circuit Court took occasion to state: "we express no opinion as to the validity or propriety of the procedures followed." The Circuit Court is referring to the procedure followed by Government Internal Revenue Officials, which it claims constitute income tax assessments against Petitioners.

WHEREFORE, Petitioners respectfully submit the Decision of the Circuit Court should be reversed, that Petitioners recover their $64,000.00, now held by the Government, with legal interest, and that Petitioners be awarded their court costs necessarily incurred.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, James A. Greenwood, certify that service of a copy of Petitioners' Reply Brief in the above case was made by United States Mail, by depositing a true copy of such Brief in the United States Post Office at Cheyenne, Wyoming, with first-class air mail, postage pre-paid, addressed to:

The Solicitor General,
Department of Justice,
Washington 25, D. C.

Dated this day of August, 1963.

JAMES A. GREENWOOD,
Counsel of Record for Petitioners.